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No. 712

In the Supreme Court of the United States

October Term, 1960

UTAH CITIZENS RATE ASSOCIATION AND STRUCTURAL STEEL AND FORGE COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, the Western Pacific Railroad Company, Utah Railway Company, Tooele Valley Railway Company, Salt Lake Garfield and Western Railway Company and the Ogden Union Railway and Depot Company move that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

The Interstate Commerce Commission will sometimes be referred to herein as I.C.C. and the Public Service Commission of Utah as P.S.C.U.

This is a direct appeal from a final judgment entered January 9, 1961, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The order increased certain intrastate rail rates on freight moving within the State of Utah.

Pursuant to request of the intervening railroads the Commission instituted an investigation under Section 13 of the Interstate Commerce Act to determine whether freight rates and charges imposed and collected upon intrastate traffic within the State of Utah caused any unjust discrimination against or undue burden upon interstate or foreign commerce.

Interstate freight rates had been ordered increased nationwide by the I.C.C. in its proceeding designated Ex Parte 175, Increased Freight Rates, 1951, 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589. On application the P.S.C.U. refused to allow similar increases on intrastate traffic. An investigation under Section 13 of the Interstate Commerce Act was instituted by the I.C.C. under its Docket No. 31484, and after full administrative proceedings it issued its report on October 17, 1955 (297 I.C.C. 87), and under date of February 8, 1956, issued an order directing that intrastate freight rates in Utah be increased in amounts comparable to the increases ordered in interstate rates in Ex Parte 175. After three-judge federal district court action sustaining the Commission's order, this Court,

on appeal, under date of May 19, 1958, reversed the district court and directed that the Commission's order be set aside and that the cause be remanded to the I.C.C. for further proceedings in conformity with this Court's opinion (*Public Service Commission of Utah v. United States*, 356 U.S. 421, 2 L.Ed.2d 886, 78 S.Ct. 796).

In the meantime, in Ex Parte 196, Increased Freight Rates, 1956, 298, I.C.C. 279, and again in Ex Parte No. 206, Increased Freight Rates, Eastern, Western and Southern Territories, 1956, 299 I.C.C. 429 and 300 I.C.C. 633, the I.C.C. had authorized further nationwide increases in the interstate rates. The P.S.C.U. again refused to authorize corresponding increases on Utah intrastate traffic, and an additional proceeding under Section 13 of the Interstate Commerce Act was instituted under I.C.C. Docket No. 32253, on which full hearing was had February 12 and 13, 1958.

After remand of the original proceeding, in Docket 31484 on reversal by this Court, the I.C.C. reopened said cause "for further proceedings in conformity with the Supreme Court's opinion." The Docket 31484 and 32253 proceedings were consolidated and further hearings were had and voluminous additional and supplemental evidence was introduced. The I.C.C. on December 7, 1959, issued its report approving the increases sought in the combined proceedings. (309 I.C.C. 149) By such report the Utah Commission was granted thirty days within which to "permit the increases required" in Utah intrastate rates to remove the discrimination against and undue burden upon interstate commerce found by the I.C.C. to exist. On January 13, 1960, and within the thirty-day period specified, the P.S.C.U. notified the I.C.C. that it would make no

order in the case but would "accept as final such order as the Interstate Commerce Commission makes pursuant to its report and findings."

Appellant here, Utah Citizens Rate Association, on January 4, 1960, filed with the I.C.C. a petition for rehearing and reconsideration of the Commission's report. On March 17 1960, the I.C.C. issued its order herein assailed, denying the petition for rehearing and reconsideration filed by the appellant and requiring the railroads, appellees herein, to establish on May 13, 1960, the rates and charges for intrastate transportation within the State of Utah in accordance with the findings in its report.

Appellant, Utah Citizens Rate Association, thereupon instituted the instant suit seeking to have the later order of the I.C.C. as issued March 17, 1960, enjoined and set aside and upon filing of the complaint a three-judge district court was convened pursuant to the provisions of the statute above referred to.

The Public Service Commission of Utah, one of the parties to the proceedings involved in the prior appeal to this Court, did not join as a plaintiff in the instant suit and has taken no action of any kind attacking or questioning the report of the I.C.C. of December 7, 1959, nor the order of March 17, 1960, based thereon.

The three-judge district court, after lengthy and detailed consideration of the entire record and after referring to the former decision by this Court in *Public Service Commission of Utah et al. v. United States of America et al.*, 356 U.S. 421, 2 L.Ed.2d 886, held that

> "the general evidence tending to show that conditions affecting intrastate traffic were not more

> favorable than those pertaining to interstate traffic, —density of traffic studies are now more convincing in favor of the carrier's position. Additional specific data and new comparative ratios have been presented by them which include terminal costs in the evaluated factors. And the record heretofore held to be deficient has been otherwise strengthened. * * *."

The district court concluded that "the Commission's present order is not vulnerable to the focused attack nor to the other objections now urged by plaintiffs" and by unanimous opinion sustained the Commission's order and dismissed appellants' complaint.

QUESTION PRESENTED FOR REVIEW

Appellants' principal contention on this appeal as set forth in their Jurisdicitional Statement is that there is inadequate evidentiary support for the finding as made by the I.C.C. that conditions incident to intrastate transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and adjoining states. Appellees insist that such evidentiary support is now overwhelming.

SUMMARY OF ARGUMENT

Comparative Operating Conditions and Costs

In the consolidated hearing—reopened by the I.C.C. after reversal of the prior case by this Court—the appellee railroads introduced voluminous and supplemental evidence, a substantial portion of which was secured from a train study made by the Utah railroads of actual operating conditions under which both intrastate and interstate traffic moved within the State of Utah. From the train study

evidence was produced to supplement and clarify evidence which had been introduced at the prior hearing. Substantial additional evidence was supplied in the areas where this Court had considered the evidence deficient on the prior hearing. Such evidence was more than ample to supply, and remove any question concerning, those deficiencies.

This new evidence showed that the majority of traffic handled in local trains was intrastate traffic while the great majority of traffic on through trains was interstate traffic. Local trains as handled by one crew were smaller or shorter trains, traveling at much slower speeds than through trains. Wages were higher on local trains, with much more overtime paid. Operating conditions on local or branch lines where more intrastate traffic moved were otherwise more onerous with steeper grades and much more excessive curvatures. The evidence was overwhelming to show that the cost of handling intrastate traffic was considerably higher than the cost of handling interstate traffic.

Traffic Density

At the prior hearing as well as the later hearing appellants introduced evidence purporting to show intrastate statistics and intrastate density which admittedly lumped together all Utah traffic, including intrastate as well as all Utah interstate traffic. At the reopened hearing appellees introduced actual ton-mile figures properly segregated between intrastate and interstate traffic, which showed interstate traffic density to be substantially greater than intrastate traffic density. Evidence with respect to unit or net ton-mile revenue showed that the net ton-

mile revenue for interstate traffic was uniformly higher than that for intrastate traffic. Interstate density was proved to be from two to six times as great as intrastate density, correcting the erroneous impression produced by appellants at the prior hearing.

Operating Ratios

In addition to voluminous additional evidence introduced as a result of the train study, the railroads also made a separate and full presentation of revenues, costs and ratios under the so-called "North Carolina Formula." These figures were admittedly based on arbitrary allocations as required by reports under a prescribed P.S.C.U. formula but, as stated by the I.C.C., nevertheless gave "rough approximations", which the I.C.C. considered with the train study and other cost evidence submitted. The additional evidence showed that operating ratios on intrastate traffic were considerably higher than those on interstate traffic.

Terminal Costs

While an actual and precise separation between interstate and intrastate costs cannot be made and should not be required under the 1958 Transportation Act, nevertheless under the arbitrary allocation figures required to be filed under the formula specified by the P.S.C.U. the railroads presented as accurate a separation as is possible in connection with the "North Carolina Formula," using the arbitrary allocations required by the P.S.C.U. together with such actual figures as were otherwise available, which figures included terminal costs and showed all costs, including terminal costs, of the handling of intrastate traffic to be substantially higher than the costs for handling interstate traffic.

Passenger Deficit

No evidence was shown as to whether the passenger deficit in Utah was higher or lower than elsewhere and it was not claimed nor in any way suggested by protestants-appellants that the passenger deficit would in any way change the results, and under the Transportation Act of 1958 the appellee railroads, the I.C.C. and the three-judge district court considered it unnecessary to make a separate showing with respect to passenger service.

Comparative Rates

It has been uniformly held that ton-mile or car-mile earnings on short hauls cannot be compared with similar earnings on long hauls. It is recognized that earnings per mile on short hauls ordinarily are and should be higher than for long hauls. Where movements of commodities intrastate could be compared with similar commodities moving interstate over comparable mileage, interstate rates were substantially higher and the unit or net ton-mile revenue produced by interstate traffic was shown to be uniformily higher than for intrastate traffic.

ARGUMENT

The judgment of the district court should be affirmed because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

COMPARATIVVE OPERATING CONDITIONS AND COSTS

At the beginning of his "ARGUMENT" in his Jurisdictional Statement, counsel for appellants poses the question:

> "A. Does the record on further hearing before the Interstate Commerce Commission supply the deficiencies in evidence found by this Court to exist in the railroads' proof in *Public Service Commission of Utah v. United States*, 356 U.S. 421, 2 L. Ed. 2d 886?"

At page 427 of 356 U.S. this Court stated:

> "As to the finding that intrastate conditions were *not* more favorable than those incident to interstate transportation the railroad evidence on this point was far from substantial. In essence, it merely showed that intrastate and interstate traffic was handled by the same crews and intermingled in the same movement. * * *."

At the reopened hearing after remand to the I.C.C. by this court the defendant railroads introduced a voluminous amount of additional evidence including a train study conducted separately by each of the railroads in Utah covering actual operations and actual movements of traffic within Utah, both interstate and intrastate. This study was conducted by the railroads in an effort to determine the nature of traffic actually moving and the cost of actually handling the Utah intrastate traffic and the interstate traffic within Utah. This evidence was in addition to the testimony showing that the Utah intrastate traffic was handled in the same trains, by the same train crews, over the same tracks and in all other respects identical with interstate traffic within Utah.

Operating conditions were shown to be considerably more onerous with respect to the handling of intrastate traffic than with interstate traffic. (R[3] 48-50, 66-70)* The study showed that intrastate traffic moves predominantly in local or way trains while interstate traffic was handled predominantly in through trains. During the period of study 88 per cent of all loaded freight car miles operated in Utah were in interstate traffic while only 12 per cent were in intrastate traffic. (R[3] 18 CR) Approximately 99 per cent of all interstate traffic was handled in through trains while only 1 per cent of interstate traffic was handled in local or way trains. The majority of traffic handled by local or way trains was intrastate traffic, and this was true in spite of the fact that a considerable number of iron ore trains handling a large percentage of intrastate traffic are classified as through trains although their crews receive higher local way train wages. (R[3] 48 CR)

In local or way trains, where the majority of traffic handled was intrastate traffic, speeds were considerably slower, and a smaller number of cars per crew were handled. The average consist of local trains was only nine loaded cars per train whereas on through trains the consist contained an average of forty loaded cars per train. (R[3] 183, 184 CR)

Arbitraries (additional compensation) were paid to local or way train crews, which were not paid to through

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*Reference marks [1], [2], and [3] herein appearing preceding record references and exhibit numbers indicate the respective records of the three separate hearings in the proceedings as follows:

[1]Indicates reference to the Docket 31484 proceeding.

[2]Indicates reference to the Docket 32253 proceeding.

[3]Indicates reference to the reopened consolidated hearing including both Dockets 31484 and 32253.

train crews, and there was much more overtime paid to local or way train crews than to through train crews. (R. 20 CR)

Operating conditions on branch lines, which handled a majority of intrastate traffic, were more onerous because grades were steeper, curvatures were more excessive, and in some areas continued braking requirements with loads on branch line grades all added to the handling and maintenance costs. (R. 25-50)

Wage costs on local or way trains were considerably higher, and the wage item is shown to be very important, amounting on the Union Pacific to over 50 per cent of train operating costs (R. 20 CR) and on the Denver and Rio Grande to over 60 per cent of train operating costs (R. 51 CR). On Union Pacific the average wage cost on through freight trains was $23.52 per thousand loaded car miles while the average wage cost on local freight trains was $226.07 per thousand loaded car miles. (Exhibit 1 CR) (R. 21 CR). Separating this between interstate and intrastate traffic handled and including the intrastate traffic handled on through trains, the results show that the average wage cost for handling all interstate traffic as handled in both through and local trains was $26.68 per thousand loaded car miles while the average wage cost of handling all intrastate traffic as handled in both through and local trains in Utah was $38.50 per thousand loaded car miles. (R. 21, 22 CR). Similar results were shown by study made by the Denver and Rio Grande Western and other railroads. (See Exhibit 2 CR, 3 CR and 4 CR). With the Rio Grande the average wage cost on all interstate traffic on both through and local trains was $21.06 per thousand loaded car miles while the average wage cost

on all intrastate traffic on both through and local trains within the State of Utah was $71.22 per thousand loaded car miles. This proves that the wage cost per thousand car miles for intrastate traffic on the Rio Grande is over three times the cost of its handling interstate traffic within Utah. (R. 54 CR). On the basis of ton-miles rather than loaded car miles the wage cost of handling Utah intrastate traffic is two times greater than the cost of handling Utah interstate traffic. (R. 215 CR).

The conclusion of the three-judge district court in the case of *North Western-Hanna Fuel Co. v. United States*, 161 F. Supp., 714 (which case was affirmed per curiam by this Court on the same date that the decision on the earlier Utah case was handed down), (356 U.S., 581), is appropos here, where at page 719 the Court stated:

> "* * * The number of trainmen required on local trains, the wages paid, the many train stops which necessarily are required in local transportation, together with other factors reflected in the record, amply established that the unit cost of rail transportation on intrastate traffic was at least equal to, and in many instances greater than, the railroads' interstate cost of comparable transportation. * * *."

Counsel for appellant refers to the statement of Commissioner Freas in his dissenting opinion with respect to lack of evidence respecting "costs for similar traffic units." A substantial amount of evidence with respect to cost per unit of traffic was contained in the record but was overlooked by Commissioner Freas and has been ignored by counsel for appellant.

The record shows that in 1957 the average revenue per ton-mile of all railroads in the United States was 1.44 cents; in the Western District it was 1.42 cents; in the Mountain Pacific States (including Utah) 1.43 cents; but for the Class I Roads operating in the State of Utah the revenue was only 1.33 cents per ton-mile. In other words, as a result of the failure of the P.S.C.U. to grant the Ex Parte Nos. 175, 196 and 206 rate increases on Utah intrastate traffic the earnings per ton-mile on all traffic, interstate and intrastate, of the Utah roads is well below that in the Mountain Pacific States (including Utah) (Exhibit 15 CR, R. 355). Calculations of the ton-mile revenue of the Union Pacific made from data on pages 8 and 12 of Exhibit 1 CR show that for the year 1957 the average revenue on Utah interstate traffic was 1.40 cents per ton-mile while on Utah intrastate traffic the average revenue was but 1.05 cents per ton-mile.

Exhibit 52 CR shows that by application of the separation principles used in the North Carolina formula, (which formula will be referred to later herein under the heading "Operating Ratios"), on the Rio Grande, Union Pacific and Western Pacific for the year 1956, Utah intrastate traffic produced an average per ton-mile revenue of 1.23 cents, and the average per ton-mile cost of handling such traffic was 1.16 cents, leaving a net of 0.07 cent revenue over expenses per ton-mile. For the same year the exhibit shows Utah interstate traffic produced an average per ton-mile revenue of 1.25 cents, with an average per ton-mile cost of 0.63 cent, leaving a net revenue over cost of 0.62 cent per ton-mile for interstate traffic. In 1957 Utah intrastate traffic produced an average of 0.14 cent per ton-mile of revenue over cost while interstate traffic handled within Utah produced an average of 0.66 cent per

ton-mile of revenue over cost. During 1957 the Ex Parte 175 increases were in effect in Utah on intrastate traffic, while the prior case before its reversal was pending before this Court, and as a result showed a higher net revenue over cost for intrastate traffic but still well below the net revenue produced by interstate traffic.

From this showing it cannot be denied that the cost per unit of traffic of handling Utah intrastate traffic greatly exceeds the cost of handling interstate traffic within Utah and that the revenue per traffic unit derived from interstate traffic handled within Utah greatly exceeds the revenue per traffic unit from Utah intrastate traffic. Appellants made no showing of conditions existing which would warrant any conclusion that the result should be otherwise.

TRAFFIC DENSITY

In the prior case involving the Utah rates the Court stated: (356 U.S. at 426)

> "* * * The annual reports of the four interstate railroads operating in Utah showed that their Utah operating ratios (freight service cost divided by freight service revenue) and the Utah density statistics (ton miles of traffic per mile of main track) were more favorable than comparable systemwide figures. * * *."

Again at page 428 the Court stated:

> "* * * As we have previously noted, appellants offered convincing evidence not only of greater density on intrastate operations, permitting a wider spread of fixed costs but also of lower operating ratios and higher returns as the percentage of intrastate traffic increased. * * *"

The I.C.C. in its prior report disregarded this evidence of appellants because it did not have a proper factual basis and thus did not present a true picture. The statistics as produced by appellants were taken from reports submitted by the railroads to the P.S.C.U. under a formula prescribed by the P.S.C.U. The figures were segregated between "system" and "Utah" statistics according to the required formula but there was no segregation between interstate and intrastate traffic within Utah (where 88% of the total traffic is interstate traffic) and the separation between "Utah" and "System" traffic was on an arbitrary train mile apportionment basis. The P.S.C.U. even with its required formula has never prescribed a method for separating or segregating intrastate operating expenses and revenues from interstate operating expenses and revenues on traffic moving within Utah.

At the prior hearing these misleading statistics were introduced by appellants near the close of the hearing and the respondent railroads did not have available a proper breakdown of the actual figures to enable them to present proper opposing evidence. After that hearing a traffic study was made by the railroads and when the matter was reopened and rehearing had before the I.C.C., the respondent railroads introduced actual traffic density statistics for the State of Utah, properly segregated between intrastate and interstate traffic, and, following a recognized formula, introduced further testimony with respect to operating ratios as hereafter referred to.

It is admitted by counsel for the appellant in his Jurisdictional Statement, pages 16-17, that in the present case the evidence as to density produced by appellants was "the same as in the preceding case." It was admitted by appellants' witness who prepared the exhibit and produced the

statistics therein contained that the figures used for Utah *intrastate* traffic did not represent Utah intrastate density alone, but the figures shown and which appellants claim as *intrastate* figures also included all interstate traffic originating in Utah and moving out of Utah, all interstate traffic originating out of but terminating in Utah, and all interstate "bridge" traffic which neither originates or terminates in but moves through or across Utah. (R[1] 312 CR; 316-317 CR; 323 CR; 326-328 CR.) All such interstate traffic has been subject to all of the Ex Parte increases in freight rates from their first inception. Thus the total of Utah interstate and intrastate traffic was lumped together and considered as Utah intrastate traffic for appellants density figures whereas the railroad train study showed 88 percent of this total Utah traffic to be actually interstate traffic. Appellants then compared this total Utah traffic with the total entire system traffic of appellees and used the *entire* system traffic (which would include intrastate traffic in other states (R[2]327 CR)) as a basis for the figures which they claimed showed interstate traffic density.

At the further reopened hearing before the I.C.C. exhibits were introduced by the railroads showing the exact traffic density of Utah intrastate traffic and of interstate traffic handled within Utah. Exhibit[3] 1 CR, page 8, shows that the average density of interstate traffic handled within Utah by the Union Pacific for the years 1953 through 1957 is more than three times greater than that of the Utah Intrastate traffic. (R[3] 24-25 CR) Exhibit[3] 2 CR, page 16, shows that for the Rio Grande the traffic density of the interstate traffic handled within Utah is more than six times the density of Utah intrastate traffic. Similar showings were made by Western Pacific Railroad Company in Exhibit[3] 3 CR.

Exhibit 53 CR was introduced for the purpose of demonstrating that the density of traffic "in the region taken for the purpose of setting the interstate rates," — in this case the entire systems of the Utah railroads, — exceeds the average traffic density of the Utah intrastate traffic by about four to one. Such a showing is described by Justice Frankfurter in *Public Service Commission of Utah v. United States*, 356 U.S. 421, 453, as being "the most persuasive" comparison. It is thus proven by the present record that the figures used by appellants as representing Utah intrastate traffic density include figures for the interstate traffic handled within Utah. In other words, appellants seek to take credit, in showing Utah intrastate traffic density, for all of the interstate traffic handled within Utah. The I.C.C. in its last report (309 I.C.C. 149), upon which the order here under attack is based, again recognized this fact, and on pages 13 and 14 of its report (309 I.C.C. 156-158) refers to the very figures introduced by protestants (appellants) in the prior hearing (which are the same as used in this proceeding) and states: "The density figures submitted by the protestants showing the intrastate density to be much greater than the system densities are impaired by the fact that those data include the Utah interstate traffic, which, in turn, includes the heavy overhead movement;" and after referring to the correct, actual density figures concludes: "The foregoing data established the more favorable density of the interstate traffic compared with the intrastate traffic."

There can now be no question but that the record proves that the traffic density statistics are not more favorable to Utah intrastate traffic whether they be compared with the density of system-wide traffic or with Utah interstate traffic.

OPERATING RATIOS

This Court in the prior Utah case referred to operating ratios. The defendant railroads have at all times insisted that it is impossible to produce accurate operating ratios unless some method be devised for a precise separation between intrastate and interstate expenses and revenues. Their position has been confirmed in this matter not only by the pronouncement in the case of *King v. United States*, 344 U.S. 254, 97 L. Ed. 301, and other similar cases but also by the enactment of the Transportation Act of 1958, which renders such a separation unnecessary.

In a further attempt to produce evidence with respect to operating ratios, the railroads produced evidence based upon the so-called "North Carolina Formula." In doing so, the railroads used such actual figures as were available and made separations of other figures between interstate and intrastate in accordance with that formula. For still other figures they used the statistics as reported to the Utah Commission according to the formula prescribed by that Commission, which is admittedly an arbitrary formula and which the I.C.C. discounted to some extent because it said it was "dependent upon train-mile apportionments." Nevertheless, that was the best evidence available, and in that connection we must point out that the operating ratios as produced and introduced in evidence by the appellants were based entirely upon those condemned figures taken from the reports made to the P.S.C.U. (R[3] 316-317 CR). Under the North Carolina formula the operating ratios as produced showed that in each instance the Utah intrastate operating ratio exceeds either the Utah interstate ratio or the system ratio, thereby indicating the higher operating cost of handling Utah intrastate traffic than either

the Utah interstate traffic or the system traffic of the Utah roads. (See Exhibit 3 CR, pages 2 and 3; Exhibit 54 CR). Counsel for appellant refers to the evidence introduced under this North Carolina Formula as an "abortive effort" and states that it "was rejected by the Commission as being unreliable." With respect to this the I.C.C., at page 24 of its report hereunder attack states "that the evidence of neither side is entitled to controlling weight." However, the Commission did not disregard it completely but referred to the use of the same formula found in *Chicago Intrastate Suburban Fares of Milwaukee Railroad*, 305 ICC 73, and quoted its holding therein that the apportionments were made by the respondents' Chief Statistician, who had had 36 years' experience in the railroad accounting field, and while the apportionments "rest in part upon uncertain bases," nevertheless stated that "they may be accepted as rough approximations only." (P. 25 of ICC report). It is apparent that the Commission, rather than disregarding this evidence completely, did give favorable consideration to it, concluding (309 I.C.C. at 165):

> "A consideration of *all the evidence of record* warrants the conclusion that the circumstances and conditions attending the performance of transportation service intrastate in Utah are not more favorable than those attending the transportation of interstate traffic to, from, or through Utah. * * *" (Emphasis supplied)

TERMINAL COSTS

In connection with his argument concerning terminal costs counsel again refers to the evidence under the North Carolina Formula as being "abortive" and "unreliable." Because it is based upon the same figures taken from the same source (Utah Reports) as appellants' statistics, and because

of the fact that the Commission did give some consideration to it, we insist that the Commission was entitled in the absence of other evidence to so give consideration to it and the figures included in that North Carolina Formula included completely all terminal costs as well as all other costs. With respect to this matter the District Court in its decision here under attack, after a thorough study of the evidence, stated:

> "* * * Additional specific data and new comparative ratios have been presented by them (the railroads) which include terminal costs in the evaluated factors. And the record heretofore held to be deficient has been otherwise strengthened.***"

The Court further stated that "interstate terminal costs could not possibly be higher than intrastate terminal costs within Utah; that the latter traffic must of necessity have two terminal costs (origin and destination) assigned to it; that interstate traffic would have only one if it originated or terminated in Utah; and bridge traffic moving across Utah would have none at all, or, at most, one (where switched between railroads within the state)." This conclusion is so obviously correct that further comment appears unnecessary.

PASSENGER DEFICIT

Counsel for appellant has argued that it was incumbent upon the Commission to consider the passenger deficit in connection with their evaluation of the evidence in this case. The case of *Kiny v. United States*, 344 U.S. 254, 97 L. Ed. 301, held that the Commission *may* give weight to deficits in intrastate passenger revenue when prescribing intrastate freight rates. It will be noted that in that case the Court does not hold that the Commission *must* give weight

to such passenger deficits. Counsel then refers to the prior decision in the Utah case and to the case of *Chicago M. St. P. & P.R.R. Co. v. Illinois*, 355 U.S. 300, 2 L. Ed. 2d 292.

We think no one would question but what there was ample justification in the *Milwaukee* case for requiring consideration of conditions under which passenger traffic moves on a statewide basis and that, as held by the Court, where only a small segment concerning passenger service only was involved such as the Chicago suburban area, passenger conditions elsewhere in the state should be considered because passenger equipment and services undoubtedly are and must be affected by statewide use and service. However, suppose the passenger deficit in Utah was higher than the passenger deficit elsewhere, would that be any reason — other things being equal — why interstate freight traffic should bear a greater burden to compensate for that passenger deficit than intrastate freight traffic should? Or, if the passenger deficit in Utah were less than in other areas, would that be any reason— other factors being equal —why intrastate freight traffic should be preferred and interstate freight traffic be required to produce additional revenues otherwise needed by the railroads? It would seem that these questions would compel an obvious answer, and, at least where the passenger traffic is an entirely separate type and segment of traffic, the Congress must have had this in mind when they passed the 1958 Amendment to the Transportation Act, stating that the Commission could make their investigations and conclusions with respect to freight rates "* * * without a separation of interstate and intrastate property, revenues and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any state. * * *" This position seems to be confirmed by

what is stated from the Congressional Conference Report referred to in the decision of the district court as reproduced beginning on page 33 of appellant's Jurisdictional Statement.

The 1958 Transportation Act was the culmination and result of weeks of the best thinking of some of the best minds in the United States Congress. Surely, after all the time and effort expended, the Congress did not come up with a useless thing that accomplished nothing whatsoever. Rather it must be considered that the wording in the Amendment means what it says, without the necessity of going afield to find some other meaning or some basis for saying that such attempt by Congress to meet a problem they thought was serious was purely abortive.

The statement of Justice Frankfurter in *Palmer v. Massachusetts*, 308 U.S. 79, 84 L. Ed. 93, at page 83 of 308 U.S., is appropos here, where, referring to interpretation of a statute, he says:

> "* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.***"

Counsel in his Jurisdictional Statement refers to and quotes from the decision of the district court and to the dissenting opinion of Justice Frankfurter in the former Utah case. We would like to call attention to the following conclusion which Justice Frankfurter made in that case. (356 U.S. at 459):

> "It does not necessarily follow that the Commission should be required to make findings, supported by evidence in the record, that the intrastate passenger deficit is not lower than the interstate, or about the profitableness of, or circumstances surrounding, any segment of intrastate operations with which it is not immediately concerned. Indeed, the consequences that follow in the train of such a requirement demonstrate that it exalts formal consistency over sound policy. In the first place if the Commission must determine the profitableness of intrastate passenger operations, it will of course be compelled to segregate revenues and costs attributable to intrastate and interstate traffic. Yet it is precisely this that in *Illinois Commerce Commission v. United States*, 292 U.S. 474, and the *King* case we said, urged on by the difficulty of accurate allocation, was not required when interstate and intrastate traffic were mingled together."

We think the conclusion is amply warranted, as voiced by the district court that the Amendment obviates "the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate, or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view."

If it is appellants contention that the deficit from Utah intrastate passenger operations is any less proportionate than the deficit from Utah interstate passenger operations, testimony to prove such a contention should have been introduced before the I.C.C. by appellants. This they did not do. There is nothing in the record to indicate any basis for such a contention.

COMPARATIVE RATES

Under his argument on comparative rates counsel for appellant again refers to the dissent of Commissioner Freas with respect to unit revenue from similar traffic units. We have already referred supra to the fact that unit ton-mile revenue generally in Utah is lower than in either the Mountain Pacific states as a whole, the western region, or the United States, and we have referred to calculations which may be made from Exhibit 1 CR, showing that on Union Pacific the ton-mile revenue in Utah on interstate traffic was 1.40 cents per mile while ton-mile revenue on intrastate traffic was only 1.05 cents per mile.

Counsel refers to Exhibit 7 CR through 20 CR and argues that if the examples therein contained are reduced to a revenue per mile basis, then in the great majority of cases the car-mile earnings on intrastate rates are substantially higher than the car-mile earnings on interstate rates. Counsel has pointed to not one single example from any of such exhibits, and the exhibits show exactly the contrary. There were one or two specific instances where an intrastate rate was as high as the comparable interstate rate and the I.C.C. specifically exempted those from the increases on page 28 of its report of December 7, 1959, (309 I.C.C. at 166), and further specifically provided that increases in intrastate rates are not to be permitted when the increased intrastate rates would exceed comparable interstate rates. A study of the exhibits referred to (Exhibits 7 CR through 20 CR) and specific reference to a few representative comparisons disputes counsel's contention completely.

Where an interstate rate covers a haul comparable to the haul covered by a Utah intrastate rate, the interstate

rate will be found to be considerably higher. For example, Exhibit 7 CR, page 1, line 14, shows an intrastate movement of sugar beets from Silver, Utah, to West Jordan, Utah. The mileage involved is 164 miles and the rate 172. Page 3, line 7, of the same exhibit shows an interstate movement of the same commodity from Moreland, Idaho, to Garland, Utah, 163 miles, with a rate of 240. Other examples are as follows:

Page	*Line*		*Miles*	*Present Rate*
2	3	Mendon, Utah, to Lewiston, Utah	32	82
3	1	Malad, Idaho, to Garland, Utah	32	97
2	7	Hot Springs, Utah, to Lewiston Utah	80	131
3	2	Dayton, Idaho to Garland, Utah	70	144
2	9	Delta, Utah, to West Jordan, Utah	142	187
3	4	Tyhee, Idaho, to West Jordan, Utah	139	221
Exhibit 8 CR—Fat Cattle				
1	11	Delta, Utah, to Ogden, Utah	171	$ 94.68
2	6	Opal, Wyoming, to Ogden, Utah	156	116.39
1	9	Nephi, Utah, to Ogden, Utah	126	77.47
2	5	Carter, Wyoming, to Ogden, Utah	118	113.28
Exhibit 9 CR—Feeder Cattle				
1	9	Ogden, Utah, to Delta, Utah	171	61.85
3	7	Opal, Wyoming to Ogden, Utah	170	133.90
1	3	Wahsatch, Utah, to Brigham City, Utah	86	47.69
3	1	Swan Lake, Idaho, to Ogden, Utah	85	81.36
Exhibit 10 CR—Fat Sheep				
1	7	Ephraim, Utah, to Ogden, Utah	154	76.66
1	8	Gunnison, Utah, to Ogden, Utah	174	77.46
2	1	Pebble, Idaho, to Ogden, Utah	132	93.09
Exhibit 20 CR—Beet Pulp				
1	15	West Jordan, Utah, to Kema, Utah	157	16
1	16	West Jordan, Utah, to Gramse, Utah	158	16
1	17	West Jordan, Utah, to Richfield, Utah	160	16
3	1	Lincoln, Idaho, to Madsen, Utah	159	26

It is true that if a comparison on a ton-mile or car-mile basis is made between a rate covering a short haul and one covering a long haul, the long haul will probably show a lower ton-mile or car-mile revenue. It is improper, however, to compare either car-mile or ton-mile revenue produced on a short haul with that produced by a long haul.

> "* * * It is an axiom of rate making that longer hauls yield lower ton-mile revenues." * * *" *Minnesota State Freight Rates*, 300 I.C.C. 201 at 216.

In that case the Commission stated at page 219:

> "The protestant Sugar Company contends that the intrastate rates are presently yielding higher earnings than are the interstate rates to the same points. This contention is not supported by the evidence. It is based upon a comparison of ton-mile earnings derived from short hauls within Minnesota with earnings from longer hauls from interstate origins. * * *."

At page 217:

> "Comparisons of the rates paid by shippers in interstate movements with those for comparable distances under the intrastate scales show a consistent advantage in favor of the intrastate shippers. * * *."

See also *California Intrastate Freight Rates and Charges*, 302 I.C.C. 189; *Robinson-Ransbottom Pottery Co. v. Pennsylvania R.R. Co.*, 188 I.C.C. 189; *Hawkins v. Western Pacific*, 153 I.C.C. 301; *Maritime Asso. Boston Chamber of Commerce v. A.A.R.R. Co.*, 95 I.C.C. 539.

Class and Commodity Rates to Florida, 142 I.C.C. 151 at 155:

> "* * *. It is recognized that earnings per mile for short hauls ordinarily are and should be higher than for longer hauls. * * *."

This Court has pronounced the same rule, which has been uniformly followed for many years. *Ohio v. U.S.*, 292 U.S. 498, 78 L. Ed. 1388. In that case intrastate rates on coal in Ohio were reduced by order of the Public Utilities Commission of Ohio. This resulted in a disruption of the relationship of the intrastate rates to the interstate rates from Pittsburgh and other similar points. After 13th Section hearings before the I.C.C. that body entered orders providing increases in certain intrastate freight rates to their former level. The district court refused to set aside the I.C.C. order and the matter was appealed to this Court. It was argued that existing interstate rates from portions of Kentucky and West Virginia and from Tennessee were lower per ton mile than those applicable to intrastate traffic in Ohio. In answer thereto this Court stated at p. 508:

> "* * * The fact is that the rates from the southern inner and from the outer crescent territory are much higher than those from Ohio mines. * * * It is undoubtedly true that the former show lower earnings per ton mile than the latter. This, however, is in entire accord with the theory of rate making, namely, that the longer haul may be expected to yield a lower ton-mile return. * * *."

The figures concerning revenue and cost per ton-mile as repeated by counsel on page 19 of his Jurisdictional Statement are taken from the arbitrary train-mile apportionments as included in the reports to the Utah Commission under that commission's allocation formula. As admitted by appellants' witness, these figures, while purporting to cover only Utah intrastate traffic, actually include

interstate traffic as well (R. 312 CR, 316-317 CR) and the costs that are used in such figures (which likewise include both intrastate and interstate traffic within Utah) are apportioned upon an arbitrary formula, which counsel is quick to characterize as "unreliable" in all of his other arguments.

Finally counsel for appellants argues, page 5, that there is nothing to show that the interstate and intrastate rates were in proper relationship before the proposed increases were ordered by the I.C.C. and poses this as one of the questions involved in this appeal. The Public Service Commission of Utah and the Interstate Commerce Commission have had the matter of Utah intrastate rates before each of them repeatedly for many years. With respect to the general level of rates and plaintiff's argument as to "proper relationship," the I.C.C. found in *Emergency Freight Rates* 1935, 213 I.C.C. 249 at 250, that "prior to April 18, 1935, the intrastate rates within Utah generally were upon the same level as the interstate rates applying to and from that state. * * *." The only thing that has happened in the meantime to alter the relationship between the general level of the interstate and intrastate rates since such finding by the I.C.C. in that case has been the refusal, in whole or in part, of the P.S.C.U. to permit increases in its intrastate rates following nation wide general increases ordered by the I.C.C. in interstate rates. In this connection the attention of the Court is called to the decision of the I.C.C. in a proceeding involving the Utah intrastate rates in connection with Ex Parte 162, 166 and 168 increases. The Utah Commission had allowed only part of the comparable increases ordered interstate by the I.C.C. in Ex Parte 162 and 166, and in Ex Parte 168 it had denied all increases in intrastate rates. In a 13th Section case involving those increases,

Utah Freight Rates and Charges, 287 I.C.C. 315, the I.C.C., after ordering the increases on intrastate traffic, added a paragraph somewhat different from its usual saving clause, wherein it stated at 345:

> "The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Utah, or of any other interested party, to apply for modification thereof as to any specific intrastate rate or charge affected thereby, *on the ground that such rate or charge is not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.*" (Emphasis Supplied.)

Further, there is a provision in the Utah law that not only allows but in fact requires the Public Service Commission of Utah to make an investigation on its own motion if at any time it concludes (or if complaint is made to it) that any rate or fare is out of line or excessive or unreasonable (Utah Code Annotated 1953, Section 54-4-2, 54-4-4). The P.S.C.U. further has not only the power but the duty to investigate rates set or proposed by the I.C.C., and if any such rate is in its opinion excessive or discriminatory, such law provides that it "shall apply by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction for relief." Utah Code Annotated 1953, Section 54-4-6.

The Utah Commission has never instituted any investigation or applied to the I.C.C. under those statutes seeking any relief claimed to have been made necessary because of any intrastate rates which have been prescribed by the I.C.C., nor has any complaint been made to it that there was any lack of proper relationship between any intrastate and interstate rate on any commodity.

Further, the Utah Commission has not joined in this suit attacking the last order of the I.C.C. increasing Utah intrastate rates, but on the contrary, has indicated its acceptance of such order as the I.C.C. might make pursuant to its report and findings. Thus there can be no question but what the interstate and intrastate rates are and have been in proper relationship except as that relationship has been affected by the failure of the Utah Commission to grant increases comparable to those imposed upon interstate commerce.

CONCLUSION

For the foregoing reasons we submit that the decision below is correct, that the district court properly concluded "that the Commission's present order is not vulnerable to this focused attack, nor to the other objections now urged by plaintiffs" and that the questions now before this Court on which the decision of the cause depends are so unsubstantial as not to warrant further argument. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, A. C. MINER, counsel of record for railroad appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of March 1961, I served on behalf of all railroad appellees herein copies of the foregoing Motion on the several parties thereto as follows:

(1) On the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200, Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and to Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington, D. C.

(2) On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to Robert W. Ginnane, Esq., General Counsel, and to Charlie H. Johns, Assistant General Counsel, at the office of the Commission, Washington, D. C.

(3) On the plaintiffs and appellants by mailing a copy thereof in a duly addressed envelope with first-class postage prepaid.

To:

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Counsel of Record for Appellants.

A. C. Miner